



October 15, 2002

Mr. Scott A. Durfee  
General Counsel  
Harris County  
1201 Franklin Street, Suite 600  
Houston, Texas 77002

OR2002-5953

Dear Mr .Durfee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170974.

The Harris County District Attorney (the “district attorney”) received two requests from the same requestor for the following information relating to grand jury proceedings concerning two named individuals: 1) a list of grand jurors, 2) a list of witnesses who appeared, and 3) a list of documents presented to the grand jury. One request also sought a copy of “any and all documents concerning the final . . . resolution” regarding one of the named individuals. You indicate that you interpret the portion of the request seeking “all documents concerning the final . . . resolution” regarding the named individual to request attorney work product relating to the case. You assert that information regarding the grand jury is not subject to disclosure under the Public Information Act (the “Act”). In the alternative, you claim that the information concerning the grand jury and the requested work product are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Initially, we note that you have not submitted the lists of grand jurors sought by category one of the requests. We therefore assume that you have released this information to the extent that it exists. If you have not released it, you must do so at this time. *See Gov’t Code §§ 552.301(a), .302.* We also note that, although you assert that article 19.42 of the Code of Criminal Procedure makes confidential the names of grand jurors, this office has previously

---

<sup>1</sup>We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988).* This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

determined that article 19.42 does not make confidential the names of grand jurors.<sup>2</sup> *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making particular information confidential); *see also* Open Records Decision No. 433 (1986) (“As a practical matter . . . the names of the impaneled grand jurors will already have been publicly divulged, since the impaneling will have taken place in open court.”)

With respect to the information you have submitted for review, we first address your assertion that grand jury information is not subject to the Act. This office has concluded that grand juries are not governmental bodies that are subject to the Act, so that records that are within their actual or constructive possession are not subject to disclosure under the Act. *See* Gov’t Code §§ 552.003(1)(B), .0035(a); *see also* Open Records Decision No. 513 (1988); Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of the Act). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury’s constructive possession and is not subject to chapter 552. Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* However, “the fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury’s constructive possession when the same information is also held by the district attorney.” *Id.*

We have reviewed the information that you submitted as Appendix C and refer to as “Grand Jury Materials.” They include an argument and other statements made in support of one of the two named individuals. You do not allege that these documents were created or obtained at the request of the grand jury or pursuant to a grand jury subpoena. The mere fact that these records were submitted to the grand jury does not mean that these documents constitute grand jury records. *Id.* We therefore find that the argument and statements are subject to the Act, and we will address your claimed exceptions thereunder. The remaining documents in Appendix C, consisting of grand jury subpoenas, transcripts, and agendas, indicate they may be records of the grand jury. Therefore, to the extent these documents are maintained by the district attorney for or on behalf of the grand jury, they are in the custody of the district attorney as agent of the grand jury and not subject to disclosure under the Act. To the extent that they are not so maintained, they are subject to the Act and may be withheld only if an exception under the Act is shown to apply. As we are unable to determine the extent to which these documents are maintained for or on behalf of the grand jury, we will also address the exceptions that you claim under the Act for these documents.

---

<sup>2</sup>Statutory confidentiality provisions such as article 19.42 are incorporated into the Public Information Act by section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

You assert that “[t]he lists of witnesses and documents submitted to the respective grand juries relate to grand jury proceedings, which are confidential by law.” Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses confidentiality provisions such as article 20.02 of the Code of Criminal Procedure, which provides that “[t]he proceedings of the grand jury shall be secret.” Thus, information that reveals the proceedings of the grand jury is confidential under article 20.02(a) of the Code of Criminal Procedure and excepted from disclosure under section 552.101 of the Government Code. Having reviewed all of the documents contained in Appendix C, we conclude that only the grand jury transcripts and agendas reveal the grand jury’s proceedings. Therefore, to the extent these documents are subject to the Act, they are confidential under article 20.02(a), and must be withheld pursuant to section 552.101. To the extent the subpoenas are subject to the Act, they are not made confidential by article 20.02. We likewise conclude that the argument and statements made on behalf of one of the named individuals do not reflect the proceedings of the grand jury and are not confidential pursuant to article 20.02. As you have claimed no other exceptions for the subpoenas, argument, and statements, they must be released. We have marked the documents accordingly.

Finally, you assert that the requested prosecutorial work product is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108 of the Government Code states in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

....

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

You indicate that the information that you refer to as “Prosecutorial Work Product” is a sample of records prepared by an attorney representing the state in anticipation of or in

preparing for criminal litigation. We therefore conclude that information such as that submitted as Appendix B may be withheld under section 552.108(a)(4)(A).

In summary, to the extent the grand jury transcripts, agendas, and subpoenas are maintained by the district attorney for or on behalf of the grand jury, they are records of the grand jury and are not subject to the Act. To the extent they are not so maintained, the subpoenas must be released but the grand jury transcripts and agendas are confidential under article 20.02 and must be withheld pursuant to section 552.101. The marked argument and statements in Appendix B must be released. Prosecutorial work product like that in Appendix C may be withheld in accordance with section 552.108(a)(4)(A).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

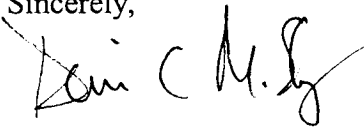
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is fluid and cursive, with the first name "Denis" being the most prominent.

Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 170974

Enc. Submitted documents

c: GySgt. Jim Thompson, USMC (Ret.)  
African-American Legal Defense Group  
P.O. Box 91212  
Houston, Texas 77291-1212  
(w/o enclosures)